UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT.

No. 16,319.

DAVID ALAN PARR,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

APPELLANT'S OPENING BRIEF.

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INDEX

TABLE OF CASES

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APPELLANT'S OPENING BRIEF.

This is an appeal from a judgment rendered and entered by the United States District Court for the Northern District of California, Southern Division. The appellant was sentenced to custody of the Attorney General for a period of one year (R. 13-14).* Title 18, Section 3231, United States Code, conferred jurisdiction in the district court over the prosecution of this case. This Court has jurisdiction of this appeal under Rule 27 (a) (1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law (R. 16).

*R. refers to the printed Transcript of Record.

STATEMENT OF THE CASE.

The indictment charged appellant with violation of the Universal Military Training and Service Act (R. 3-4). It was alleged that he became a registrant of the Selective Service System, and that having theretofore been duly classified in Class I-A, did knowingly refuse and fail to comply with the order to submit to induction (R. 4).

Appellant pleaded not guilty, waived jury trial, was tried. convicted, and judgment was pronounced on October 7, 1958 (R. 12-14).

Defendant had subpoenaed the complete secret investigative report of the FBI, used by the Department of Justice and the complete report of the Department's Hearing Officer to the Department. Motion to Quash was granted by the trial court (R. 8). A written motion for judgment of acquittal was filed (R. 9). The motion was denied and defendant sentenced, as aforesaid. The motion contains all of the grounds that the Appellant relies upon for reversal of the judgment in this case (R. 9, 46).

THE FACTS.

Appellant was registered with the Selective Service System in 1951. He timely filed his Classification Questionnaire, November 13, 1951.** It showed (page 7) he was

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**The exhibit (Government's) is the selective service file of appellant. The sheets are not consecutively paginated (as is ordinarily done by the clerks of the Local Boards) so reference to important documents will be made by the date of receipt, stamped thereon; page numbers of individual documents will be referred to when they exist.

a conscientious objector and (on page 3) he was a minister, regularly serving as such, and that he had been one of Jehovah's witnesses since August 10, 1941. This form also showed that he resided in the dormitory that is part of the headquarters of Jehovah's witnesses (page 2) and that all his time was devoted to work connected with the Watchtower Bible and Tract Society (page 4). He attached to this questionnaire form a three page letter, detailing his religious life and activities.

The local board called him in for an interview and, by a 3-0 vote classified him in Class IV-D (minister).

In September, 1953, he left the Brooklyn work and (by letter received on October 8) notified the local board of his new, Sacramento address, adding: "I am now working with the Sacramento California Central Unit of Jehovah's witnesses."

On March 16, 1954, he was asked by the local board for further information, on its mimeographed form. He filled this form out completely, and added the information that he had "left Bethel Family September 21, 1951" (the headquarter's dormitory).

In April, 1954, he was sent the Special Form for Conscientious Objectors (SSS Form No. 150). This he completed in great detail. He showed he believed in a Supreme Being; that he relied "upon Almighty God Jehovah and his son, Christ Jesus, for guidance"; that he spent many hours in bible study; that he believed in force only for self defense and then "not to the point of taking a life". He gave details of his religious training and gave name

and address references of individuals who knew of his conscientious objector and other religious beliefs and activities. He showed he had never been a member of any military organization.

Attached to this nationally used Special Form for Conscientious Objectors (SSS Form No. 150) was a two page mimeographed form with 12 additional questions. Appellant answered them in the spaces provided and attached two additional sheets of further information. The first of the 12 additional questions relate to ministry; the last five relate to conscientious objection. These latter five deal with use of force, with participation in "any war that he understands is authorized by Jehovah" and with whether the basis for his conscientious objections is his desire to preach or his unwillingness to use force, or on the views of the Watchtower Society, as expressed in certain named, published articles.

On July 12, 1954, the three local board members made an office memorandum for the file, reading:

> "It appears registrant although he may be a minister is no longer devoting full and regular time and effort to ministry as prescribed by regulations because of full time secular work."

On July 12, 1954, he was reclassified in Class I-A (available for all military activity). He timely appealed.

On August 30, 1956, he appeared, by invitation, before the Hearing Officer of the Department of Justice and presented oral and written evidence to rebut the adverse evidence and misconceptions that had become known to him

by reason of the resume of the F.B.I. investigative reports furnished him.

The resume is in the file, and consists of five and one-half typewritten pages. All informants interviewed, and all material and facts referred to on the first five pages present a unanimous picture of excellent background, character, truthfulness and sincerity. The sixth page presents the beliefs of the sole "adverse" informant, namely, that:

> registrant "failed to meet the requirement of a Bethel member," * * * "was immature in spiritual knowledge" * * * "was spiritually sick and a playboy" but concluded that *he "personally believed the registrant to be sincere in his claim of being a conscientious objector."* (Emphasis supplied).

Appellant gave the Hearing Officer a "To Whom it May Concern" letter signed by aforesaid informant (M. A. Larson, Manager) dated September 12, 1953. This date is a week before appellant left the Bethel Home. This letter concludes that "He had an excellent attendance record and was of high moral standing. In view of these qualifications, he has our highest recommendation".

The resume contained no comment, by anyone, reflecting adversely on Parr's truthfulness or sincerity, *or conscientious objections to war.*

At the hearing before this Hearing Officer, he was asked the question, "Why can you not engage in such non-combatant service as caring for sick and wounded military personnel?" His response was, "The Bible prohibits a

Christian from taking any part in war. A noncombatant is just as guilty as a combatant. He is just like the guy who drives a car in a bank robbery—the driver is just as guilty as the one who holds up the bank. So it is with one who is a noncombatant—he is just as guilty as the one who shoots. It is the principle behind it. Taking care of the sick would be just the same as making bandages for the Red Cross or making bullets in a defense factory. As soon as the sick are patched up they are sent back to fight. Christ said that our 'wars are not with carnal weapons as Christians are not of this world.' Personally, I would care for sick and wounded people, but not in military hospitals because in so doing I would be spending my time in worldly things." He elaborated, "my duty to the Government is to observe the laws as long as they do not conflict with God's laws, such as paying taxes. It is really none of my business where the tax dollar goes. Christ said, 'render under Ceasar the things that are Ceasar's.' " (*sic*).

The Department sent an adverse recommendation to the Appeal Board, attaching a copy of the resume (but not the full F.B.I. reports) and in its letter of adverse recommendation made reference to the adverse attitude of the Hearing Officer, but did not attach or incorporate the text of the Hearing Officer's report.

The Department's letter of adverse recommendation stated that the handwritten answers on his Special Form for Conscientious Objectors "show a level of education and learnlng far below that appearing in the typewritten additions to his SSS Forms Nos. 100 and 150. It would seem

obvious that the registrant has had considerable help in the completion of his questionnaires. If so, this fact has not been indicated on these forms as required".

At no other place does the file contain an attack on his candor.

At no place is there any showing that the Hearing Officer (or anyone) questioned him as to whether he had received help in answering forms or questions propounded.

As required by law, the Appeal Board sent him a copy of the Department's letter and gave him 30 days to comment.

On February 11, 1957, appellant timely wrote the Appeal Board a two page letter. Among other things, he commented: "I assure all of the answers are my own thoughts in my own choice of words".

The Appeal Board retained him in the same I-A classification. The record shows there is no recording of whether the Appeal Board gave any consideration at all to his standing claim that he is a minister, or why it rejected his claim for a conscientious objector's classification. Thereafter, he was ordered to report for induction. He complied but refused to submit to induction, and was thereafter convicted for said refusal.

QUESTIONS PRESENTED AND HOW RAISED.

I.

Appellant presented written and oral evidence he was a minister and also was a conscientious objector. He was ultimately classified in neither of these classifications appropriate to his professions of fact.

The question presented was there a basis of fact for denying him one of the claimed classifications.

This question and the others raised herein, were presented by the Motion (R. 9) and by the Statement of Points (R. 46).

II.

A second question arose when the trial court quashed the subpoena issued by the defendant.

The question presented is whether appellant was illegally denied the use of the F. B. I. report, and other documents, to test whether the resume of it, and the reports and recommendations based thereon, were fair.

III.

A third question arose when it appeared, from the Exhibit, that the Appeal Board was advised to rely on the hearsay attributed to F. B. I. informant M. H. Larson, by the Department of Justice.

The question presented is whether an illegal basis for judgment was presented.

SPECIFICATION OF ERRORS.

I.

The district court erred in failing to grant the motion for judgment of acquittal.

II.

The district court erred in quashing the defendant's subpoena.

III.

The district court erred in convicting the defendant and entering a judgment of guilty against him.

SUMMARY OF ARGUMENT.

I.

The appellant made out a *prima facie* case for at least one of the conscientious objector classifications.

No basis in fact exists for denying him at least one of these classifications.

II.

The appellant should have had the opportunity to compare the F. B. I. reports with the resume furnished him to show that favorable information was withheld from the Appeal Board and from him.

III.

The advice given the Appeal Board, by its attorney (the Attorney General) was erroneous and prejudicial.

It was erroneous in that the principal issue for decision was the registrant's conscientious objections and the advice to not so classify him was based on a standard in no way applicable to this issue.

ARGUMENT.

I.

The Denial of the Claim for Classification As a Conscientious Objector Was Without Basis in Fact and the Recommendation of the Department of Justice and the Classification Given to Appellant by the Appeal Board Were Arbitrary, Capricious and Without Basis in Fact.

This point is involved in *Rogers* v. *United States,* No. 15647, February 2, 1959, Writ of Certiorari pending.

Appellant's brief in said Rogers appeal has been compared with particular concern to the facts involved in this case, and it is believed that if the Rogers decision is reversed, reversal in this appeal will follow.

A.

In any event, the facts concerning Parr's conscientious objections place him well within the boundaries already set by the Supreme Court and are readily distinguishable from Rogers. In the Rogers case the registrant, when he appeared before the Local Board, asserted "* * * that his

claim as a conscientious objector was based primarily upon his desire to preach * * *" (page 2 of slip opinion). Subsequently, and after he appeared before the Hearing Officer, he wrote the Appeal Board: "My claim for Exemption as a conscientious objector is based solely on the fact that I am a regularly ordained minister of the gospel." (page 3 of slip opinion).

Nowhere in Parr's record is there such a limited religious basis for his conscientious objections to war. As related in some detail in The Facts (*supra*) he set forth his religious life and activity and, with particularity, his beliefs with respect to taking life. See particularly his answer to the Hearing Officer's question, *supra*. His religious basis for his conscientious objections was broad, not "solely" or even "primarily" like Rogers, on a desire to preach.

Thus, the only question is whether the *prima facie* case presented by him is rebutted by something else in the file.

The material that probably was considered "adverse" is that presented by one of the informants uncovered by the extensive F. B. I. investigation (see Resume of report, in Record). This man's adverse statements, nevertheless, refer only to Parr's qualifications for the *ministry*. They showed only that the informant considered Parr not up to the standard he believed was required for Bethel Family members: that he was "spiritually sick" and that he didn't devote enough time to the ministry. The informant did not question Parr's sincerity with respect to conscientious objection. In fact, this informant explicitly stated that he considered Parr a true conscientious ob-

jector. Therefore, the implied finding of insincerity (by the Selective Service System) to stand, must have something else as a basis.

The Attorney General believed Parr lacked integrity because of a supposed inconsistency between Parr's claim to full-time ministerial activity and the informant Larson's reference to Parr's failure to apply himself to bible study and preaching. There is no inconsistency here because Parr's claim of full-time ministerial activity was made in November, 1951 (See Classification Questionnaire, SSS Form No. 100, page 4, and also its three page supplement). There he showed he had been doing this full time work for seven months. The informant Larson's complaint, made to the F. B. I. in 1955, was obviously referring to the period preceding Parr's termination at Bethel, namely, the fall of 1953. It is submitted that a ministry neophyte's ardor, enthusiasm, devotion, etc., may wane and/or that other interests may crowd out or alter his earlier intentions and schedule of application to a rigid regimen, but that his conscientious objections to war are not thereby abandoned or even weakened.

The only other possibility that the record discloses is the speculation of the Attorney General's assistant (T. Oscar Smith) that the answers given by Parr in the various questionnaires show that he did not compose them without help and, by not disclosing this, was guilty of lack of candor. Such speculation is precisely what the Supreme Court condemned in *Dickinson* v. *United States,* 74 S. Ct. 152, 158:

"But when the uncontroverted evidence supporting a registrant's claim places him prima facie within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice."

It is to be noted that neither the Hearing Officer nor any one ever asked him if he had help, and finally, that when he learned of this speculation, he wrote the Appeal Board, on February 11, 1957: "I assure all of the answers are my own thoughts in my own choice of words".

B.

There is still another reason why no basis in fact exists for a I-A classification in the face of the record built by Parr.

He presented substantial evidence that he was a regular, and in fact, an ordained minister, and that the ministry was his vocation. His evidence was convincing, even to the draft board, for it classified him as a minister.

Thereafter he was declassified and the only new evidence was the following:

1. He was no longer a resident of Bethel;

2. He did secular work in California;

3. Mr. Larson didn't consider him to be a good minister.

None of these, or all together, afford a firm basis for his declassification:

1. Residence in Bethel may be a good reason for classifying a registrant in Class IV-D, but non-residence is no bar to a registrant otherwise qualified. This should need no argument.

2. Almost the same can be said for the secular work in California. It is clear from the record that the major portion of his time at Bethel was in the press room; that "During the week (five and one-half days) my duties are exclusively at the headquarters, my evenings and week-ends are devoted to door-to-door preaching and congregational duties, as well as Bible research and study." (See Attorney-General's letter to Appeal Board, January 15, 1957; also see Exhibit A attached to it for a clarification of 5½ day duty, towit: "During this time he worked in the crew of our high speed web rotary magazine printing presses.")

When he returned to California did he devote a greater portion of his time to secular work? There is nothing in the record to suggest this, let alone show it.

Does a considerable amount of secular work disqualify a registrant for a IV-D classification? It didn't when he was classified in Class IV-D and it shouldn't, for the test should be vocation. True, it irks many local boards to consider a young man a minister, when he devotes less time to wholly clerical duties than do the ministers of the board members. But the courts should apply the correct standard. It is not too difficult a problem and this court early faced it in *Brown* v. *United States*, 216 F.2d 258, where a reasonable line was drawn, namely, that secular work to provide subsistence and defray expenses was no bar to being classified as a minister (259).

The most recent Court of Appeals decision on this phase of our subject is *Wiggins* v. *United States*, 5 Cir., 261 F.2d 113, Cert. denied March ....., 1959. Here it was held:

> "We hold that a crane operator working a forty-hour week may be a minister in Jehovah's Witnesses and entitled to the ministerial exemption under the Selective Service Act, although spending only forty hours a month in religious duties." (119).

It is therefore concluded that we have here a case within Dickinson, *supra*, and the other decisions that require a reversal when no basis in fact exists for denying a registrant the conscientious objector classification.

II.

The Appellant Was Illegally Denied His Right to Have the Use of the F.B.I. Report upon the Trial to Test and Determine Whether the Resume of the F.B.I. Report Sent to the Appeal Board Was Illegal Because It Omitted Favorable Evidence Appearing in the F.B.I. Report That Parr Was a Bona Fide Conscientious Objector, Notwithstanding the Report of the Hearing Officer and the Recommendation of the Department of Justice.

What has been said in Point I above with respect to the effect on this appeal of a reversal in the Rogers appeal also applies to this point.

Since the point is a strictly legal one and does not involve a factual discussion, and since it was rejected, no argument will be presented on the principal feature of it

other than expressing a desire to preserve it, pending its ultimate disposition by the Supreme Court.

A feature of this point, distinguishing this case from Rogers', is the following: in Rogers' case, in each of the two final recommendations of the Department to the Appeal Board it is stated that all the evidence gathered by the F. B. I. is summarized in the resume (see page 41, Appellant's Opening Brief in Rogers).

In the instant case there is no such explicit or inclusive statement. Rogers was assured by the Department that all the favorable information was before the Hearing Officer. Parr has never been given even such an assurance. His only safety (and his conviction shows he needed it) was to have his subpoena honored.

III.

The Attorney General's Adverse Recommendation to the Appeal Board Was Arbitrary and Was Based on Artificial and Irrelevant Grounds Contrary to the Act and the Regulations.

The letter of January 15, 1957, from the Attorney General to the Appeal Board recommending that appellant be denied a conscientious objector classification recounted a number of bases for such rejection. Although we believe all of them unfair, we also believe it need not be shown that all are lacking in legal or factual basis. This, because the record does not show on what portion of the Attorney General's advice the appeal board relied. Our point, that a situation like this requires reversal of a conviction, was stated by this court in 1954, *Affeldt* v. *United States*, 218 F.2d 112 at 115.

We limit our task, therefore, to arguing that at least one basis presented to the Appeal Board was erroneous, as a matter of law.

The letter takes a whole page (p. 2) of single space typewriting to show that the registrant didn't meet the F. B. I. informant M. H. Larson's standard of what a resident minister at Bethel Home should be. It is important to note that nowhere during this page of discussion is any mention made of the opinion, also attributed to Larson: "and he personally believed the registrant to be sincere in his claim of being a conscientious objector." This statement is to be found only in the resume of the F. B. I. report.

Not only is this most relevant and apropos statement of Larson not to be found at the particular place where the Attorney General deals with the adverse opinions of Larson (which, as argued above, dealt solely with the ministry classification) on said page 2, but it is nowhere to be found in the body of the five page, single-spaced letter of the Attorney General. Doubtless this omission was not calculated with the thought that the Appeal Board members, unpaid volunteers, have too much to do when they meet to read all exhibits; almost certainly this omission was solely due to the zeal and ardor of a prosecution-minded advocate, proceeding with his eyes focused solely on supporting his adverse recommendation. It is recognized that there is a presumption that administrative officials do their duty and read everything in a file, but counsel has no hesitancy in going outside the record and stating that he is informed and believes that when the California Selective Service Appeal Board panels currently hold ses-

sions, they have been deciding only 50 cases an hour, compared to the 80 per hour decided during wartime. This is not to say that good consideration is not given to some, but is to say that there is no possible comparison of the time and attention given by the members of this administrative appellate body to the time and attention given judicial appellate cases.

In short, the M. H. Larson information discussed on page two of the said letter could well have been a chief or even the sole basis used by the Appeal Board.

Finally, this court, in addition to *Affeldt, supra,* condemned a determination where it appeared that "the appeal board may have accepted the erroneous advice of the Department of Justice * * *". See *United States* v. *Batelaan,* (1954) 217 F.2d 946, last paragraph. Other courts have followed this salutary principle in criminal cases, and one not citing *Batelaan* or *Affeldt* is *United States* v. *Erikson,* S.D. N. Y., 1957, 149 F. Supp. 576.

CONCLUSION.

The judgment of conviction should be reversed.

Respectfully submitted,

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Attorney for Appellant.

April 29, 1959.